

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE

COMMITTEE MEETING MINUTES FOR NOVEMBER 2, 2001

**Westin Hotel, San Francisco Airport
Friday, November 2, 2001
10:00 a.m.**

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Westin Hotel at the San Francisco Airport on November 2, 2001. Attendance was as follows:

MEMBERS PRESENT:

Nelson D. Crandall
Teri Shugart Erickson
Timothy J. Fitzpatrick
James F. Fotenos
Mark T. Hiraide
Brian D. McAllister
David M. Pike
Cynthia Ribas
Randall B. Schai
James R. Walther
Daniel J. Weiser
Neil J. Wertlieb
Nancy Wojtas

MEMBERS ABSENT:

Keith Paul Bishop
David S. Caplan
John C. Carpenter
Hazen, Steven K.
Bruce Dravis
James K. Dyer, Jr.
Steven K. Hazen
Carol K. Lucas
Eileen Lyon
B. Keith Martin
Ethna M. Piazza

LIAISONS PRESENT:

Timothy Le Bas, Department of Corporations
Hugh A. O'Boyle, Corporate Law Department Committee
Timothy Hoxie, Executive Committee

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda which are not described in these Minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements.

The meeting was brought to order by Co-Chair James Walther at approximately 9:30 a.m. Neil Wertlieb then introduced Committee members to the group. Mr. Wertlieb then led a discussion of the use of videoconferencing in lieu of in-person meetings, given the difficulties some members are having in airline travel. It was agreed that the January 4th meeting would be held by videoconference (Mayer

Brown's offices in Palo Alto and Milbank Tweed's offices in Los Angeles) and that videoconferencing for other meetings would be considered in the future on a case-by-case basis.

Mr. Wertlieb said that he had been contacted by a member of the Nonprofits Committee with respect to a report concerning Corporations Code Section 500 prepared by the Committee in 1993. It was suggested that either Gordon Yamati or Nelson Crandall might be good sources, since they worked on the original report. Mr. Wertlieb also suggested that, going forward, the Committee should maintain a library of materials produced by the Committee.

Mr. Wertlieb led a brief discussion of the advisability of establishing an advisory board to the Committee, whose members would be former Chairs of the Committee and/or other leaders in corporate law. Members agreed that this was an idea worth pursuing. Mr. Wertlieb also asked for suggested topics for MCLE presentations to the Committee, to be scheduled later in the Committee's year after legislative projects have been completed.

Timothy Hoxie, liaison from the Business Law Section reported that a recent California Court of Appeals decision in *Viner v. Sweet*, 92 Cal. App 4th 730 (2001) has created some interest with the Executive Committee. The case involved a malpractice action against an attorney representing a client in a business transaction. The decision in *Viner* held that a client in a malpractice action does not have to prove that, but for the attorney's malpractice, the client would have achieved a better result (which is the standard for a malpractice claim in a litigation matter). Mr. Hoxie said that the Executive Committee would like to know if anyone is interested in preparing an amicus brief in this case. Anyone interested should contact Messrs. Wertlieb or Hoxie directly. Dan Weiser said he would see if anyone at Wilson, Sonsini might be interested in working on a brief. Mr. Walther said he would solicit interest at Mayer, Brown.

B. Approval of Minutes of October 5, 2001 Meeting.

The draft minutes of the meeting of the Committee held on October 5, 2001 and previously circulated to the members, were approved with minor changes.

II. LIAISONS' REPORTS AND DISCUSSION.

A. Executive Committee.

Mr. Hoxie introduced himself as the Executive Committee liaison for Northern California. Mr. Hoxie noted that Bob Stansell acts as liaison for Southern California. Mr. Hoxie also explained the work of the Executive Committee in coordinating the activities of the various committees in the Business Law Section. Mr. Hoxie said that the third annual meeting of the Business Law Section will be held in May in La Costa. A Spring retreat for chairs and co-chairs of the various Business Law Section committees will be held March 15-17, most likely at Bodega Bay. Mr. Hoxie concluded by saying that the manual for committee chairs and co-chairs (containing information or format for legislative proposals, procedures, and other information) will be posted at the Business Law Section web page.

B. Corporate Law Department Committee.

Hugh O'Boyle summarized recent activities of the Corporate Law Department Committee. He said that the Corporate Law Department has four in-person meetings per year and that the rest are held by videoconference or teleconference. The committee will be holding an educational meeting in January for in-house corporate counsel. The committee has adopted a new mission statement and is

developing a web page, where minutes of committee meetings will be posted. Mr. O'Boyle reported that Al Hillebrand from the Committee will act as the Southern California liaison from the Corporate Law Department Committee. Neil Wertlieb suggested that the Corporate Law Department Committee participate in the legal opinion project. Mr. O'Boyle said he would discuss that with members of his Committee.

C. The Department of Corporations.

Tim Le Bas, the Assistant Commissioner of Law and Legislation (Formerly the Office of Policy) introduced himself and gave an overview of the operations of his office. Mr. Le Bas explained that the functions of this office have recently expanded to include not only functions the office has historically performed (such as reviewing comment letters regarding legislation) but also acting as general counsel to the Commissioner of Corporations. Mr. Le Bas then summarized for the Committee several issues his office is working on, including the following:

- The Department is adopting 25102(o) exemption rules to accommodate limited liability companies. Mr. Le Bas stated that the Department is on the third emergency order with respect to these regulations because of the number of comments received. After final regulations have been adopted, there will be a solicitation of interest for additional comments on all stock option rules.
- Comments have been received and reviewed with respect to the "15 or fewer client" rule for investment advisors and final changes and adoption of revised rules will follow after all comments have been reviewed. Mr. Le Bas noted that he had received a comment letter from Keith Bishop, a copy of which will be circulated to Committee members in next month's meeting materials.
- The Department will consider posting on the Department web site a bulletin with respect to the changes to the notice requirement under Section 25102(o).
- The Department is considering a potential reduction in small business filing fees pursuant to SB742.
- The Department is finalizing rules to implement AB1048. Mr. Le Bas reported that the Department is conforming its broker-dealer filing procedures to federal procedure and moving towards an electronic filing system. The Department is also moving the annual filing date for broker-dealers from May to December to coordinate with the federal CRD filing system.
- The Department is also considering a pilot project for electronic filing of 25102(f) notices. If successful, electronic filing could be expanded to include other filings with the Department.
- The Department is in the process of putting all its forms in electronic format. As part of that process, the Department will update its forms, as necessary. Mr. Bas suggested that anyone with comments about forms used by the Department contact the Department directly with any suggestions for improvement.
- In connection with AB1230, the Department has developed a simplified finance lenders application form which will be reviewed and adopted within the next several months.
- Keith Bishop has submitted a letter to the Department with respect to corporate conversions. Mr. Le Bas said his office will work with the Committee on issues raised in Mr. Bishop's letter as well as with respect to legislative proposals set forth in SB399.
- Mr. Bishop has also submitted a letter to the Department regarding a usury

exemption for venture capitalists making bridge loans, which Mr. Le Bas's office is also reviewing. It was noted that the Committee may develop a formal legislative proposal in connection with this issue.

- Mr. Le Bas briefly discussed implementation of NMSIA and asked that anyone with comments or suggestions contact the Department.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report of Legislative Liaison.

Mr. Fotenos said there were no new legislative activities to report on. Mr. Fotenos noted that Terry Miller has joined the State Bar legislative office to assist Larry Doyle.

B. SB399 (Corporate Conversions).

Mr. Stansell is drafting a memorandum to the Committee regarding the status of SB399 from the recently completed legislative session for use in moving the Committee's proposal through the legislative process next year. Neil Wertlieb said he would contact Larry Doyle concerning the best way to address the issue regarding notice to creditors that arose during last year's legislative session when SB399 was being considered.

C. Section 710 Summit on Supermajority Approvals.

David Pike reported that the legislative proposal regarding amendments to Section 710 was with Larry Doyle and, after a sponsor has been found, would be introduced during the upcoming legislative year.

IV. WEB SITE PROJECTS.

A. Posting of Law Firm Communications/Advisories to Clients.

Nancy Wojtas reported that she had sent a Cooley Godward client advisory letter to David Caplan for posting on the Committee web site.

B. Recent Developments Page.

Ms. Wojtas provided the Committee with a list of recent developments appropriate for the Committee web site including:

- SEC provided guidance regarding cooperation in investigations;
- SEC Division of Corporate Finance issues - quarterly update of current issues outline;
- Nasdaq provides temporary relief on minimum bid and public float listing requirements.

V. OTHER PROJECTS.

A. Opinion Task Force.

Nelson Crandall led a discussion of the revised outline of the report distributed to Committee members. Mr. Crandall reported that to-date he had only received about six responses to his request for members interested in participating in a working group for the legal opinion report. Mr. Wertlieb said that every Committee member will have to participate in order to complete this project within a reasonable time. Members agreed that, if they did not express an interest in working on a particular section of the report, Mr. Crandall would assign members to a specific working

group. Participation in the opinion project is also open to attorneys who are not members of the Committee (but these participants must meet the qualifications for serving on the Committee, including having been in practice for at least five years). Anyone interested should contact Mr. Crandall directly.

B. Educational Activities.

Mr. Walther reported that the Committee will have a panel presentation at the winter meeting of the Business Law Section Education Institute to be held January 18-20, 2002 in San Diego. Bruce Davis is organizing the presentation and said that the topic will be "down round" venture capital financings. The panel will consist of an attorney from Wilson, Sonsini, David Caplan and a person from Vantage Point Partners.

C. Business Law News Articles.

Mr. Walther reported that the committee is responsible for at least one article per year for the Business Law Section newsletter. Bruce Davis is coordinating this. The deadline for submitting articles is June 2nd. Mr. Fotenos suggested that an article on the Viner case might be appropriate. Mr. Weiser said that he will check at Wilson, Sonsini to see if anyone is interested in preparing an article on "down-round" financings.

D. 25102(f) Regulations, Including Reasonable Belief Standard.

Mr. Fitzpatrick said that he will follow-up with Larry Doyle to determine the status of this proposal.

E. 25118(b); Definition of Aggregate Evidence of Indebtedness.

Mr. Weiser reported that he is still searching for legislative history or other indications of legislative intent before determining whether a legislative proposal amending Section 25118(b) is advisable.

F. Investment Advisor Exception.

Keith Bishop recently sent a letter to the Department of Corporations on this issue. A copy will be circulated to Committee members.

G. Discussion of New and Continuing Projects for the Coming Year.

Mr. Wertlieb led a discussion of the projects list included with the meetings materials. The following was noted:

- Brian McAllister will look at the potential conflict between the Section 25100 requirement of a \$3.00 minimum bid price (for NMS) and the current Nasdaq NMS policy of a minimum bid price of \$1.00, to determine if any further action by the Committee is necessary.
- Mr. Bishop will determine the necessity of technical corrections to the Corporations Code to reflect Nasdaq NMS becoming an "exchange" under the Securities Exchange Act of 1934.
- Mr. Wertlieb noted that more people are needed to work on the project for fax and electronic filings with the Secretary of State.
- Members were encouraged to suggest potential speakers for future meetings of the Committee.
- Members were also encouraged to draft articles for The Business Lawyer.
- Members were further encouraged to provide law firm client communications

suitable for posting to the Committee's web site. Ms. Wojtas said that she would call Richards, Layton in Delaware to ask them to submit items for posting on the Committee web site.

- Mr. Walther said that, with respect to the constituency project, the Committee's web site and MCLE presentations are used to recruit new members. Teri Erickson suggested that a list-serve be established to notify participants when new material is posted to the Committee's web site.
- Mr. Weiser said that he would examine California law regarding director duties to creditors and prepare a short summary and proposal for next month's meeting.

The meeting was adjourned at approximately 12:30 p.m.

/s/ David M. Pike
David M. Pike
Secretary

Corporation Committee Meeting Minutes

